No. 2272

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-PACIFIC CONSTRUCTION COMPANY (a corporation),
Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COMPANY (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

WILLIAM F. HUMPHREY,
Attorney for Plaintiff in Error.

LENT & HUMPHREY,
Of Counsel.

No. 2272

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN-PACIFIC CONSTRUCTION COMPANY (a corporation),
Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COMPANY (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the Case.

This is an action at law for damages for an alleged breach of contract. The defendant in error had judgment in the lower court for $17,372 as alleged damages.

The facts of the case may be briefly summarized as follows:

Shortly after the San Francisco disaster of April 18, 1906, "The Richlieu Realty Syndicate," a Cali-

fornia corporation, leased the premises in the City and County of San Francisco, known as the southeast corner of Geary Street and Van Ness Avenue and decided to erect thereon an eight-story *combined office building and theatre* (Tr. p. 106). The American-Pacific Construction Company (plaintiff in error), a California corporation, was organized in the latter part of the year 1906, for the purpose, generally, of erecting buildings, but not *for the fabrication of, or the erection of* the steel members that entered into the construction of a building. The Modern Steel Structural Company (defendant in error) is and for many years prior to the year 1906, was, and ever since has been, a Wisconsin corporation, organized for the special purpose of manufacture, fabrication and erection of steel structures of all kinds, with its plant at Waukesha, Wisconsin (Tr. pp. 75-76). S. B. Harding, president of the Modern Steel Structural Company (defendant in error), was in San Francisco when "The Richlieu Realty Syndicate" was seeking bids for the structural steel and iron work required for its proposed building. He was then counselling the American-Pacific Construction Company to open a structural steel shop at San Francisco and promised to aid it in establishing such shop by interesting himself in it and sending men to operate the plant (Tr. p. 80; p. 92). It was then suggested that the plaintiff in error bid for the steel work on the Richlieu Realty Syndicate Building and sublet the contract to the defendant in error. It was argued that the plaintiff in error, a local concern,

would probably have more chance than the defendant in error. Mr. Harding, president of the defendant in error, knew that the plaintiff in error was unfamiliar with the steel business and offered to and did plan the contract which plaintiff in error was to propose to the Richlieu Realty Syndicate (Tr. p. 84; p. 85; bottom page 86, and p. 87; p. 90; p. 91; p. 96). The proposition as planned by Mr. S. B. Harding was submitted to "The Richlieu Realty Syndicate" and accepted (Tr. p. 84). The first acceptance was verbally given on or about the 22nd day of December, 1906 (Tr. p. 82).

Early in January, 1907, the Modern Steel Structural Company sent to the plaintiff in error, for its acceptance, a proposal in the following words:

> "PROPOSAL FROM MODERN STEEL STRUCTURAL CO.
>
> Waukesha, Wis., Jan. 4, 1907.
>
> American-Pacific Construction Co.,
> San Francisco, Cal.
>
> We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with the *drawings furnished by Jos. D. Smedberg* AND *specifications also furnished by J. D. Smedberg,* identified with marks: 'Copy #1' Initialed, 'S. B. H. 12-30-06' excepting as noted under 'remarks' on sheet #2 attached.
>
> Namely, the structural steel and iron (except the grillage beams, bolts, separators, and column bases mentioned on page 3, of specifications referred to above) for the Richlieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—Southeast corner of Van Ness & Geary St., San Francisco, Cali.

Delivery: as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907,* required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

Remarks: Our proposition is based on the substitution in part (as referring to '*kind, character and finish of materials*' beginning page 9 and '*inspection*' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the American-Pacific Construction Company, at their own expense, will weigh same at the Public Scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the American-Pacific Construction Company, the amount overpaid us.

Price to be Seventy-seven dollars ($77.00) per ton; Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted

at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of Expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements of understandings outside of this contract and that no agent or salesman has any authority to obligate the Modern Steel Structural Company by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the Modern Steel Company until the same has been fully paid for in Cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any differences of opinion shall arise between the parties to this contract in relation

to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.

Ship Via:

Modern Steel Structural Co.,
Accepted Jany. 17th, 1907. By S. B. H.
Approved by S. B. Harding, Pres.
American-Pacific Construction Co.,
Thomas Vigus, General Manager."

Here it is essential to note that the drawings referred to in said proposal were never, *even to this day,* completed (Tr. pp. 108, 165, 255), and without them there was no means of ascertaining the tonnage of steel in the proposed building, except by *guess work,* and that the specifications were not attached to the alleged proposal or contract. The proposal was signed and returned to defendant in error about January 15, 1907 (Tr. p. 102).

On the first of March, 1907, defendant in error shipped from Waukesha, Wisconsin, to plaintiff in error thirty-nine and one quarter (39¼) tons of fabricated steel of the value of $3021.09. This is the only steel fabricated or shipped by defendant in error under the said proposal (Tr. p. 231).

On April 8, 1907, for the first time it became apparent to the plaintiff in error that the Richlieu Realty Syndicate was a financial wreck and unable to carry out its contract and plaintiff in error immediately telegraphed defendant in error to stop all

work, and later advised defendant in error that the Richlieu Realty Syndicate was hopelessly insolvent and had abandoned the contract (Tr. p. 20; p. 132; p. 133; p. 137). When it was beyond question that the Richlieu Realty Syndicate was unable to carry out and had abandoned the contract plaintiff in error on the 13th day of April, 1907, telegraphed defendant in error (Modern Steel Structural Company) to wire its outside figure in full settlement of the alleged contract (Tr. p. 135). No reply was received and on the 15th day of April, 1907, the plaintiff in error wrote asking the outside cost and asking defendant in error in fixing the cost to remember that plaintiff in error, independent of this contract, would sustain a heavy loss (Tr. p. 137). In reply defendant in error asked $30,230 as damages caused by the cancellation of an alleged contract, the total amount to be paid on full performance of which was, according to defendant in error only $115,500 (Tr. p. 138; p. 46). In other words, it claimed damages in the sum of $30,230 for the non-fulfillment of a contract, which, if fulfilled required the payment only of $115,500. Defendant in error attempted to justify its claims for damages in several different ways, every one of which finds its sole support in *speculation* and *guessing*.

By its letter of May 28, 1907, the items of the alleged damages are specified as follows:

Material as per accompanying 4 sheets—weight—275,481 lbs. at $1.90 unloaded in our yard	$ 5234.14
Car of steel invoiced	3021.09
Expenses and money advanced J. D. Smedberg	350.00
Shop Drawings	1441.53
UNUSED SHOP SPACE LYING IDLE	20,183.24
Total	$30,230.00

(Tr. p. 149).

J. D. Smedberg was *the representative of the Richlieu Realty Syndicate and of its architect* (Tr. pp. 104, 127, 223). Yet money loaned to him was charged against plaintiff in error as part of the alleged damages.

By its letter of the 15th of October, 1907, defendant in error wrote that the above figures were made up "somewhat hurriedly" (request for them was made April 22, 1907 (Tr. p. 140) and they were furnished by letter dated May 28, 1907,—thirty-six days later—(Tr. p. 149), and, therefore the figures given under date of May 28, 1907, were more or less approximate. But by October 15, 1907, it had ample time to consider its damages and to detail the items making up the total sum of $30,931.23 which was its new appraisement of its damage (Tr. p. 211). In this appraisement it added to the actual cost of raw material and the cost of fabrication various percentage of such cost as part of its "overhead expenses"

that should be chargeable to this alleged contract (Tr. pp. 211, 216, especially 214).

Another appraisement was made in its first complaint in which it fixed its damages at $30,881.23 (Tr. p. 10).

A fourth appraisement is made in its second complaint and the total amount is fixed at *$35,164.17* (Tr. p. 147).

Mr. S. B. Harding, president of the defendant in error, gives the fifth appraisement of the alleged damage and fixes it at $34,470.00 (Tr. p. 156). And although the "overhead expenses" of the defendant in error amounting to $7171.23 monthly (Tr. p. 164) were not included as part of the cost in this estimate, and they were included in all other estimates, the total damages seems to pivot about the mystical $30,000.

F. W. Harding, vice-president of the defendant in error, offers the sixth estimate of the damage sustained by the defendant in error by breach of the alleged contract and fixes it at $29,637.00 (Tr. bottom page 186). He did not include in his estimate of the cost of performing the alleged contract, the share of the "overhead expenses" chargeable to this contract (Tr. p. 187).

The president of the defendant in error and (Tr. p. 156) its vice-president (Tr. p. 186) testified to the amount of damage, and its secretary gave his estimate in writing (Tr. pp. 211-216). There was absolutely no agreement among them on the cost of per-

forming the contract, or in any particular, except in the amount of damage. Each guessed an amount in the neighborhood of $30,000; notwithstanding that, on January 25, 1907, the defendant in error, through it president wrote:

> "*If you desire to buy the job elsewhere and not give the $77.00, we would be very much pleased to relieve you, only asking you to pay us what we have already done*" (Tr. p. 189); and

again on the 31st day of January, 1907, before the alleged breach of contract, the same president wrote in effect that there was no profit in the alleged contract with the plaintiff in error:

> "We felt in the whole transaction that we were more *carrying out the obligations made by F. G. Harding, of Los Angeles, than anything else, as we were so filled up with work and the writer further said that we would be pleased if we could sublet it to someone and get out* EVEN *and at the same time serve you,* but if we could not, we were going to stick by and fill the order."

These circumstances and unconsciousable claim of damages indicate that the defendant in error intended to take advantage of the "inexperience" in (Tr. p. 85) and the "unfamiliarity" of plaintiff in error (Tr. pp. 86-87) with steel work and probably explains why defendant in error wrote plaintiff in error on the 31st of December, 1906, "You will have to put yourself in our hands to do the right thing by you * * *" (Tr. p. 91).

The questions raised on this writ or error relate to the following propositions:

1. The proposal of the defendant in error and its alleged acceptance by the plaintiff in error did not constitute a valid, or any, contract, because:

(a) It was incomplete as it proposed to furnish all the structural steel required for a building to be constructed in accordance with drawings to be furnished by Joseph D. Smedberg, which drawings were never made and therefore there was no means of knowing or determining the quantity of steel to be furnished.

(b) Although the purpose was to furnish all the structural steel shown by drawings and specifications to be furnished by Joseph D. Smedberg, neither drawings nor specifications were ever attached to, nor made part of said proposal and neither the drawings nor the specifications were ever completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated; or the size, form, weight, or appearance of the various steel members entering into said building, or the cost of fabricating the same.

(c) The said alleged contract is uncertain and indefinite inasmuch as it does not show, nor in any manner indicate the amount of steel to be fabricated or the size (long, short, broad, or narrow) weight, (light or heavy,) form, appearance, or style into which the various steel members of the proposed

building were to be fabricated. Therefore, the defendant in error never could fabricate the steel for a building—the drawings and design for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, although in his mind he had formed a conception of its exterior design.

2. There was no proof of damage, except of the amount actually expended by the defendant in error in part performance of the alleged contract, to wit: the sum of $3021.09. Even if the alleged proposal and acceptance constitute a valid contract, there is absolutely no evidence of damage, except in the sum of $3021.09, the amount spent in part performance of the contract, all other damages being based on purely speculation and guess work The proposal was too indefinite to establish a sufficient predicate for fixing specific or any damages.

3. There was a variance between the contract alleged and the one sought to be proved, in the following particulars:

(a) It was alleged that the contract was for an agreed amount of steel, to wit: 1500 tons. The testimony shows simply a proposal to furnish the structural steel required for the Columbia Theatre Building and shown by the drawings and specifications to be furnished by Joseph D. Smedberg and no such plans were ever prepared or furnished.

(b) The contract alleged provided delivery of all fabricated steel at San Francisco, on or before Sep-

tember 1, 1907, at $77.00 per ton, f. o. b. San Francisco; while the testimony offered to sustain an alleged contract for steel at $77.00 per ton, freight allowed to San Francisco and deliveries to be made as follows:

> "That portion indicated by Mr. Smedberg shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received, Jan. 3, 1907, required to begin the erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.
>
> Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg."

4. The action is premature, if the contract is valid, then any difference concerning it or the work done, must be settled by arbitration. The defendant in error has never arbitrated the dispute involved in this action. This clause was inserted by the defendant and is a condition precedent to its right of action.

Question one (1) above is raised on exceptions:

(a) To the ruling of the court admitting in evidence the proposal of defendant in error, dated January 4, 1907, and being plaintiff's Exhibit "K" and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court in allowing witness, Samuel B. Harding's answer, over objection

by plaintiff in error, the following question: "Does it indicate the acceptance of the contract" (Tr. p. 104).

(c) To the ruling of the court admitting in evidence over the objections of plaintiff in error certain alleged incomplete specifications, made by Frank T. Shay and Joseph D. Smedberg and marked Exhibit "M" (Tr. p. 105).

(d) To the ruling of the court in admitting in evidence over the objections of the plaintiff in error certain 31 sheets of detail drawings (Tr. p. 125).

(e) To the ruling of the court allowing the witness Samuel B. Harding, over the objections of plaintiff in error, to answer the question "Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?" (Tr. p. 128.)

(f) To the ruling of the court refusing to grant the motion of counsel for plaintiff in error to strike out the following answer of witness Samuel B. Harding "And my reasons for that statement would be this: The American Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of *14* or 1500 tons as I remember. Now the architect's plans—I am speaking now of the original plans from which we made our detail drawings—*were incomplete at the time we began work*, and Mr. Smedberg came up for the purpose of completing these drawings and

insofar as we went in examining the original drawings prepared by the architect we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit "O" calling attention to the discrepancies and I, therefore, from such investigations and discrepancies found, think that the building would run up the 1500 ton mark, if not more, and these increases spoken of are 20 per cent or 25 per cent. Of course this would not apply to all the structure (Tr. pp. 130-131).

(g) To the ruling of the court in allowing witness Frederick Hoffman, over the objection of counsel for defendant (plaintiff in error) to answer the following question: "From your examination of the drawings and specifications of the building in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?" (Tr. p. 177).

(h) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(i) To the refusal of the court to instruct as a matter of law that as the drawings which were a material part of the contract were never completed the contract was void and the verdict must be for the defendant (Tr. p. 281).

(j) To the refusal of the court to instruct the jury that unless the plaintiff established by a pre-

ponderance of evidence the following elements, to-wit: the existence of a contract, containing plans and specifications; the character of the work to be done, the price, the quantity to be delivered and time of delivery and that the cost to plaintiff in carrying out such a contract was less than the contract price, the verdict must be for the defendant (Tr. p. 281).

(k) To the refusal of the court to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation, for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts

which are established that there was a contract or if you conclude that there was a contract but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor (Tr. p. 287).

(l) To the refusal of the court to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The

plaintiff can only recover when his testimony outweighs that of the defendant (Tr. p. 288).

(m) To the instruction of the court to the effect that there was under the evidence but one question left for the jury to determine in reaching a verdict and that is the amount of damages plaintiff suffered through the breach of contract sued on (Tr. pp. 288-289).

(n) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever, that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished and that plaintiff at the direction and request of defendant had entered upon its execution so that, for all purposes affecting the rights of the parties herein involved, the contract is to be regarded as having been duly executed, as to the alleged breach of the contract by the defendant,

the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

Question 2 above is raised on exceptions

(a) Same as are specified as being raised by question I.

(b) To the ruling of the court sustaining the objection of counsel for plaintiff (defendant in error) to question asked Thomas Vigus, to wit: "With whom did you have that conversation?" (Tr. p. 181).

(c) To the ruling of the court denying the motion for nonsuit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(d) To the refusal of the court to instruct as a matter of law, as follows:

In its third amended complaint on file plaintiff alleges: that on the 19th day of January, 1907, a contract was made with the defendant whereby plaintiff agreed to deliver f. o. b. cars San Francisco, California, at $77 per ton the quantity of

structural steel and iron required by plans and specifications for the Columbia Theatre Building, recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons, and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907.

I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant (Tr. p. 281).

(e) To the ruling of the court in refusing to instruct as a matter of law, as follows:

It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so, there is no evidence upon which you may base any verdict as to the amount of damage sustained by plaintiff (Tr. p. 282).

(f) To the ruling of the court in refusing to instruct as a matter of law, as follows:

You are not to guess at the amount of such costs nor to enter into the realm of speculation,

for the burden of proving such costs is upon plaintiff and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff's expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant, because the plaintiff, in that event has not established by a preponderance of the evidence, the facts which are essential to a verdict in its favor (Tr. p. 282).

(g) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In a case of this kind, there are two distinct items as the ground of damages: *First.* What has already been expended towards performance, less the value of the materials on hand purchased for this particular work. *Second.* The profits that plaintiff would have realized by the performance of the whole contract.

The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires (Tr. p. 283).

(h) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract, then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of the evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release, from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in the circumstances your verdict must be for the defendant (Tr. p. 283).

(i) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If there is omitted from the evidence elements of expense which plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and released from the risk of performance then your verdict should be for the defendant (Tr. p. 284).

(j) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In determining plaintiff's costs in performing said alleged contract allowance must be made for every item of cost and expense attending a full compliance with any performance of said alleged

contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural (Tr. p. 284).

(k) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract, its expense ceased; its plant became free to be used in other ventures and was no longer employed in this, and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained (Tr. pp. 284-285).

(l) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did not procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract you should

deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case (Tr. p. 285).

(m) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not damaged by the alleged breach of contract or if so damaged the amount of those damages, but it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages (Tr. pp. 285-286).

(n) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant (Tr. p. 286).

(o) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and

the amount of such profits, your verdict must be for the defendant (Tr. p. 286).

(p) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract, but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts

which are essential to a verdict in its favor (Tr. p. 287).

(q) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant you must find for the defendant; that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant (Tr. p. 288).

(r) To the instruction of the court given as follows:

This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication of structural steel. With the nature and terms of that contract you have been familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on (Tr. pp. 288-289).

(s) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent that the specifications and drawings had been furnished and that plaintiff, at the direction and request of defendant,

had entered upon its execution so that for all purposes affecting the rights of the parties herein involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties and which is wholly uncontroverted directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

(t) To the instruction of the court given as follows:

The rule or measure of damages which may be recovered for the breach of a contract such as this, is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated buildings in its entirety as provided in the contract, less what you

may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; and, in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest, I would suggest to you, will be at the legal rate of seven per cent under the law of this state (Tr. pp. 290-291).

(u) To the instruction of the court given as follows:

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence; that is, by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying your minds. The direct evidence of one witness who was entitled to

full faith and credit is sufficient to prove any fact in a case such as this (Tr. p. 291).

(v) To the instruction of the court as follows:

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty first, that what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building; thereupon by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, $77.00, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages which, under the law, it would be entitled to recover (Tr. pp. 291-292).

(w) To the instruction of the court as follows:

In figuring the cost to plaintiff of fabricating the steel in question the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, should not be taken into account unless you find that such item of general expense

in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract, but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant (Tr. p. 292).

(x) To the instruction of the court as follows:

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand as stated, that reasonable certainty in the respect mentioned is all that is required. Plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you and it is for your consideration alone. It is the duty of the court to state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence, and is not the

result of arbitrary desire on the one hand or of surmise or speculation on the other (Tr. p. 293).

Question 3 above is raised on exceptions:

(a) To the ruling of the court admitting in evidence plaintiff's Exhibit "K" and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court denying the motion for non-suit made by defendant (plaintiff in error) (Tr. pp. 231-232).

Question 4 above is raised on exceptions:

(a) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

II.

Assignment of Errors.

Many errors are assigned in connection with the four main questions presented above, and arise principally upon the admissibility of evidence and upon the giving or the refusing of instructions. All of these latter questions, however, are subsidiary to the four questions enunciated and at most lend color to the propositions therein involved. Independent of their connection with the points made in the admissibility of the evidence, or the instructions the four main questions can be discussed on the record. The other errors will be discussed only in connection with or incidental to

the main questions. A consideration of such errors may give a clearer understanding to the contentions of plaintiff in error.

They are therefore all included in the following assignment of errors upon which the plaintiff in error will rely herein, and which it intends to urge in the prosecution of this writ of error.

ASSIGNMENT No. 1.

The court erred in refusing to give the following instruction requested by the defendant:

> "I instruct you that inasmuch as it appears from the evidence that the drawings were a material part of the contract and were never completed, that the contract is void and therefore your verdict must be for the defendant."

the same being contained in the transcript of record on pages 280 to 281 and said refusal constituting Exception No. 11.

ASSIGNMENT No. 2.

The court erred in refusing to give the following instruction requested by the defendant:

> "In its third amended complaint on file plaintiff alleges that on the 19th day of January, 1907, a contract was made with the defendant whereby plaintiff agreed to deliver to defendant F. O. B. cars San Francisco, California, at $77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons

and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907."

"I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence, the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant."

the same being contained in the transcript of record on pages 256-257 and said refusal constituting Exception No. 12.

Assignment No. 3.

The court erred in refusing to give the following instruction requested by the defendant:

"It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so there is no evidence upon which you may base any verdict as to the amount of damages sustained by plaintiff."

the same being contained in the transcript of record on page 257 and said refusal constituting Exception No. 13.

Assignment No. 4.

The court erred in refusing to give the following instruction requested by the defendant:

> "You are not to guess at the amount of such costs, nor to enter the realm of speculation, for the burden of proving such costs is upon plaintiff, and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff's expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant because the plaintiff in that event has not established by a preponderance of the evidence the facts which are essential to a verdict in its favor."

the same being contained in the transcript of record on page 257 and said refusal constituting Exception No. 14.

ASSIGNMENT No. 5.

The court erred in refusing to give the following instruction requested by the defendant:

> "In a case of this kind there are two distinct items as the ground of damages. *First:* What has already been expended towards performance, less the value of the materials on hand, purchased for this particular work. *Second:* The profits that plaintiff would have realized by the performance of the whole contract.
>
> The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires."

the same being contained in the transcript of record on pages 257-258 and said refusal constituting Exception No. 15.

Assignment No. 6.

The court erred in refusing to give the following instruction requested by the defendant:

> "If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in these circumstances, your verdict must be for the defendant."

the same being contained in the transcript of record on page 258 and said refusal constituting Exception No. 16.

Assignment No. 7.

The court erred in refusing to give the following instruction requested by the defendant:

> "If there is omitted from the evidence, elements of expense which the plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and release from the risk of performance, then your verdict should be for the defendant."

the same being contained in the transcript of record on page 258 and said refusal constituting Exception No. 17.

ASSIGNMENT No. 8.

The court erred in refusing to give the following instruction requested by the defendant:

> "In determining plaintiff's cost in performing said alleged contract allowance must be made for every item of cost and expense attending a full compilance with, any performance of, said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural."

the same being contained in the transcript of record on pages 258-259, and said refusal constituting Exception No. 18.

ASSIGNMENT No. 9.

The court erred in refusing to give the following instruction requested by the defendant:

> "If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract its expense ceased; its plant became free to be used in other ventures and was no longer employed in this and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon,

as to the possible profits plaintiff would have earned or damages it would have sustained."

the same being contained in the transcript of record at page 259 and said refusal constituting Exception No. 19.

Assignment No. 10.

The court erred in refusing to give the following instruction requested by the defendant:

"If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did not procure other work to take the place of the work mentioned in said contract during the time it would be employed in the performance of this contract, you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case."

the same being contained in the transcript of record on page 259 and said refusal constituting Exception No. 20.

Assignment No. 11.

The court erred in refusing to give the following instruction requested by the defendant:

"The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the palintiff was not damaged by the alleged breach of contract, or

> if so damaged the amount of those damages. But it devolves upon the plaintiff in order to prevail to establish by a prepondearnce of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages."

the same being contained in the transcript of record on page 260 and said refusal constituting Exception No. 21.

ASSIGNMENT No. 12.

The court erred in refusing to give the following instruction requested by the defendant:

> "If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant."

the same being contained in the transcript of record on page 260 and said refusal constituting Exception No. 22.

ASSIGNMENT No. 13.

The court erred in refusing to give the following instruction requested by the defendant:

> "In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits your verdict must be for the defendant."

the same being contained in the transcript of record on page 260 and said refusal constituting Exception No. 23.

Assignment No. 14.

The court erred in refusing to give the following instruction requested by the defendant:

> "The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.
>
> If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract but that the damages claimed are to speculative or remote your verdict should be for the defendant because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor."

the same being contained in the transcript of record on pages 260-261 and said refusal constituting Exception No. 24.

ASSIGNMENT No. 15.

The court erred in refusing to give the following instruction requested by the defendant:

> "The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.
>
> The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant."

the same being contained in the transcript of record on pages 261-262 and said refusal constituting Exception No. 25.

ASSIGNMENT No. 16.

The court erred in giving the following instruction:

"The COURT. Ordinarily I would not submit the case to you at this hour, but we are rather short of jurors on the panel and I may need your services in another case in the morning. It strikes me that this case is a very simple one, not only in its facts, but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night. My hesitation about submitting a case to a jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such results will follow in this case, so I will submit the case to you now. Give me your attention.

This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication and delivery of structural steel. With the nature and terms of that contract you have been made familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on.

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever that the contract was duly

executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it have been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff at the direction and request of defendant had entered upon its execution so that for all purposes affecting the rights of the parties here involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituting in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon.

This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.

The rule or measure of damages which may be recovered for the breach of a contract such as this is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands is the difference between the agreed price per ton for the quantity of structural steel which you may find from the

evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this state.

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence, that is, by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against a less number or other evidence satisfying your mind. The direct evidence of one witness who is entitled to full faith and credit is sufficient to prove any fact in a case such as this.

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different

elements of cost involved in the work as disclosed in the testimony; and, secondly, the probable gross quantity of steel in tons it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, $77, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages, which, under the law, it would be entitled to recover.

In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments without regard to this particular work, should not be taken into account unless you find that such items of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the item of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiffs plant had the entire work contemplated by the contract been done at such plant.

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand, as stated, that reasonable certainty in the respect mentioned, is all that is required; plaintiff is not called upon to prove his case to a demonstration; the evidence is all before you and it is for your con-

sideration alone. It is the duty of the court to state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is an conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence and is not the result of arbitrary desire on the one hand or of surmise or speculation on the other.

The clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion you will report to the court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so the other form of verdict which the clerk has drawn up will not be required and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the federal court the verdict of the jury must be unanimous, and cannot be by a less number as in the state courts. You may now retire, gentlemen of the jury."

the same being contained in the transcript of record on pages 262-267, and the giving thereof constituting Exception No. 26.

Assignment No. 17.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of a certain proposition which purports to be a proposition by the Modern Steel Structural Company, dated Waukesha, Wisconsin, January 4,

1907, to the American-Pacific Construction Company, whereby the Modern Steel Structural Company agreed to furnish the structural steel and iron and reinforcing steel (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to in said proposal) for the Richelieu Syndicate Theatre and Office Building known as the Columbia Theatre, located southeast corner Van Ness Avenue and Geary Street, San Francisco, California, being plaintiff's Exhibit "K", and which was and is in exactly the following words and figures, to wit:

"Modern Steel Structural Co.
Waukesha, Wis., Jan. 4, 1907.

American-Pacific Construction Co.,
San Francisco, Cali.

We propose to furnish you in good order the following described structural material constructed in a workmanlike manner described as follows and in accordance with drawings furnished by Joseph D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks:

'Copy No. 1', initialed, 'S. B. H. 12/30/06', excepting as noted under 'REMARKS' on sheet No. 2 attached.

Namely the structural steel and iron and reinforced steel (except the grillage beams, bolts, separators and column bases mentioned on page 3, of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; location, southeast corner of Van Ness and Geary Street, San Francisco, Cali.

Delivery as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back*

of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

Remarks. Our proposition is based on the substitution in part (as referring to '*Kind, Character and Finish of Materials*' beginning on page 9 and '*Inspection*' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the American-Pacific Construction Company, at their own expense, will weigh same at the public scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the American Construction Company, the amount overpaid us.

Price to be Seventy-seven dollars ($77.00) per ton: Freight allowed to San Francisco, Cal. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements of understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the MODERN STEEL COMPANY until the same has been fully paid for in cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be

settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire (testimony of F. W. Harding), *whose decision shall be binding on all parties to the contract.*

Ship via:

MODERN STEEL STRUCTURAL CO.,
Accepted Jany. 17, 1907, by S. B. H.
Approved by S. B. Harding, Pres.
AMERICAN-PACIFIC CONSTRUCTION CO.,
Thomas Vigus,
General Manager."

and admitting the same in evidence as shown in the transcript of record on pages 99 and 190-196, and said ruling constituting Exception No. 27.

ASSIGNMENT No. 18.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

"'Does it indicate the acceptance of the contract?' To which question witness replied, 'It indicates that I, on receipt of that letter and enclosure, gave the job a number, and contract as it were, through which it would be known in our plant by number. That is the custom whenever we receive an accepted contract, to at once give it a number.'"

and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 28.

ASSIGNMENT No. 19.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of certain specifications made by Frank T. Shay, Architect, San Francisco, and Joseph D. Smedberg, Consulting Engineer, San Francisco, which purported to be specifications for the structural steel and iron of an eight-story office building and theatre to be erected on the southeast corner of Van Ness Avenue and Geary Street, for the Richelieu Syndicate, San Francisco, Cal., being plaintiff's Exhibit "M", and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 29.

ASSIGNMENT No. 20.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of certain detail drawings consisting of 31 sheets on tracing cloth, made by the Modern Steel Structural Company, which purported to be detail drawings for a part of the structural steel work for said Columbia Theatre Building, being plaintiff's Exhibits "A", "B", etc., and annexed to defendant's bill of exceptions, and marked Exhibit "A" and admitting the same in evidence, as shown

in the transcript of record on pages 276-277, and said ruling constituting Exception No. 30.

ASSIGNMENT No. 21.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

> " 'Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?' to which question the witness replied, 'It did.' "

and admitting the same in evidence as shown in the transcript of record on page 277, and said ruling constituting Exception No. 31.

ASSIGNMENT No. 22.

The court erred in refusing to grant the motion of counsel for said defendant (plaintiff in error) to strike out the following portion of the answer of the witness Samuel B. Harding:

> " 'And my reasons for that statement would be this: The American-Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it; now the architect's plans—I am speaking now of the original plans from which we made our detail drawings—were incomplete at the time we began work and Mr. Smedberg came up for the purpose of completing these drawings, and insofar as we went in examining the original

> drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit "O", calling attention to the discrepances, and I therefore, from such investigations and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent or 25 per cent. Of course this would not apply to all the structure.' The question propounded to the witness was: 'But 1500 tons at least according to these specifications?' To this question the witness answered 'Yes,' and proceeded as stated before."

and admitting the same in evidence as shown in the transcript of record on pages 277-278, and said refusal constituting Exception No. 32.

Assignment No. 23.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Frederick Hoffman:

> " 'From your examination of the drawings and specifications of the buildings, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?' to which question the witness replied: 'In my judgment it would take in the neighborhood of 1500 tons.' "

and admitting the same in evidence as shown in the transcript of record on page 278, and said ruling constituting Exception No. 33.

ASSIGNMENT No. 24.

The court erred in sustaining the objection of counsel for plaintiff to the following question asked by counsel for defendant (plaintiff in error) of the witness, Thomas Vigus:

> "'With whom did you have that conversation'? It was admitted that the conversation sought to be elicited was had with S. B. Harding, the president of the plaintiff company,"

and excluding the same from evidence as shown in the transcript of record on pages 278-279, and said exclusion constituting Exception No. 34.

ASSIGNMENT No. 25.

The court erred in denying the motion of counsel for defendant (plaintiff in error) for a judgment of non-suit and dismissal. Said motion being made on the following grounds:

> "1. That there is a failure of proof in the following particulars:
>
> a. It is not shown by the evidence that there has been a completed contract; on the contrary, the evidence shown that the contract is incomplete and imperfect in this:
>
> That the proposal which is set forth in the evidence here and dated the 4th day of January, 1907, states that the defendant was to furnish certain structural steel in accordance with drawings and specifications to be furnished by Joseph Smedberg, which were identified with certain marks. It affirmatively appears from the evidence that those drawings have never been made or furnished.
>
> 2. There is a variance in this: The contract alleged required the plaintiff to deliver to de-

fendant at San Francisco the fabricated steel on or before the 1st day of September, 1907, while the contract placed in evidence by plaintiff required delivery to be made within sixty or ninety days after completion of the detailed drawings.

3. There is a variance in this: The contract alleged states that there was an agreed tonnage of 1500 tons of steel to be furnished, while the contract placed in evidence shows there was agreed tonnage.

4. The action is premature inasmuch as the contract offered in evidence provides: 'In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.' From the evidence it appears that there was no arbitration, and therefore the action is premature.

5. There is no evidence of damages. The attempt to show loss of profits or damages failed. There is absolutely no evidence of the costs, hence there is no way of determining any damages, except by guesswork."

as shown in the transcript of record on pages 279-280 and said denial constituting Exception No. 35.

To the discussion of the questions involved in the case as reflected by the propositions advanced in the rulings and instructions which constitute the foregoing assignment of errors we shall now proceed.

III.

Argument.

I.

THE PROPOSAL OF THE DEFENDANT IN ERROR AND ITS ACCEPTANCE BY THE PLAINTIFF IN ERROR DID NOT CONSTITUTE A VALID OR ANY CONTRACT (Exhibits "K" and No. 3 p. 99) BECAUSE:

(a) *It was incomplete as it proposed to furnish all the structural steel required for a building to be constructed in accordance with drawings to be furnished by Joseph D. Smedberg, which drawings were never made and therefore there was no means of knowing or determining the quantity of steel to be furnished.*

(b) *Although the purpose was to furnish all the structural steel shown by drawings and specifications to be furnished by Joseph D. Smedberg, neither drawings nor specifications were ever attached to, nor made part of said proposal; and neither the drawings nor specifications were ever completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated; or the size, form, weight or appearance of the various steel members entering into said building or the cost of fabricating the same.*

(c) *The said alleged contract is uncertain and indefinite in the amount of steel to be fabricated or size (long, short, broad or narrow), weight (light or heavy) form, appearance or style into which the*

various steel members of the proposed building were to be fabricated. Therefore, the defendant in error never could fabricate the steel required for a building, the drawings and designs for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, although in his mind he had formed a concept of its exterior design.

Even a casual reading of the exhibit shows it to be a mere indefinite proposal. It is so designated. It was submitted by the defendant in error and must be construed against it and in favor of the plaintiff in error.

There can be no contract, so-called, enforceable at law unless its terms are certain, and the minds of the parties to the contract have met and agreed on its terms. This is horn-book law. It is so elementary and the authorities bearing thereon so numerous, and relate to cases of such varying circumstances, that only a few, illustrative of these principles, are cited.

In *Levy v. Mantz,* 16 Cal. App. 666, 670, it is held that the due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such assent that the law enforces the terms of the contract.

In *Grafton v. Cummings,* 99 U. S. 106, the court said:

> "In an agreement of sale * * * there must be *a sufficient description of the thing sold* and of *the price to be paid for it*. It is, therefore, an essential element of the contract, that it shall contain within itself a description of the thing sold by which it must be known or identified."

In *Gill Mfg. Co. v. Hurd,* 18 Fed. 673, it is held that in order to constitute a contract the minds of the parties must meet on all its terms. If any part of the contract was not settled or a mode agreed upon to settle it, as to that part there would be no contract.

In *Almini Company v. King,* 92 Ill. App. 276, defendant in error sued to recover damages for the failure of plaintiff in error to comply with the terms of an alleged contract in writing by which it is said to have agreed to do the painting and glazing upon a house in process of construction. The contract referred to plans and specifications as "herein made a part" of it.

In holding the contract unenforceable, the court said:

> "They are not, however, attached to the instrument, nor is there anything in the contract to locate or identify them in any way. The contract, therefore, as offered, and upon which defendant in error bases his claim to recover, is incomplete. The original specifications, as prepared, were introduced, but there is no evidence that they were ever seen by the Almini Company, or its agents, either before or at the time the contract was signed, or that they ever were in any way attached to or made a part of or

identified in the contract, and there is no evidence to the contrary. The incomplete contract was not admissible in evidence and the objection thereto should have been sustained."

Also:

Wait Eng. & Arch. Juris., Secs. 214-695;
Worden v. Hammond, 37 Cal. 61;
Willamette etc. Co. v. College Co., 94 Cal. 229;
Donnelly v. Adams, 115 Cal. 129;
Hitchcock v. Galveston Fed. Co., 6534;
Woir v. Brown, 14 Barb. 39, 50;
Merchers v. Schloss, 49 How. Pr. 286;
Adams v. Hill, 16 Me. 215.

No case can be cited in which a contract as incomplete or as uncertain as the alleged contract in the case at bar was ever sustained.

Remembering the principles announced above, we quote from the proposal:

"*Proposal from the Modern Steel Structural Company*", dated "Waukesha, Wis. Jan. 4, 1906". "We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner *described as follows and in accordance with* DRAWINGS FURNISHED BY JOS. D. SMEDBERG *and* SPECIFICATIONS ALSO FURNISHED BY JOS. D. SMEDBERG, IDENTIFIED WITH MARKS: "Copy #1, initialed, 'S. B. H. 12/30.06'," excepting as noted under rearks on sheet #2 attached, namely, the structural steel and iron, etc."

The proposal in providing for the time of delivery, states that certain of the structural material was

> *"to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg. Balance of steel shipments to be 60 or 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg."*

It must be conceded by the defendant in error—the uncontradicted evidence forces the concession:

1. That said Joseph D. Smedberg was the engineer employed by the Richelieu Realty Syndicate and by its architect, Frank T. Shay, and was not in the employ of the American-Pacific Consctruction Company (plaintiff in error).

See

Testimony of S. B. Harding, president, defendant in error (Tr. p. 104; Tr. p. 127);

Specifications received in evidence on behalf of defendant in error (Tr. p. 106; also p. 107);

Testimony of F. W. Harding, vice president, defendant in error (Tr. p. 223).

2. That the drawings referred to in the said proposal were never completed nor furnished by Joseph D. Smedberg.

(a) Even the drawing for the upper part of the office portion of the building was not completed when the proposal was accepted.

Testimony S. B. Harding (Tr. p. 104).

(b) The theatre constituted more than one-half of the proposed combined office and theatre building.

F. W. Harding, vice president of defendant in error, testified the theatre would occupy from forty to fifty per cent of the entire building (Tr. p. 254; also p. 255).

C. H. Snyder, contracting engineer with Milliken Brothers, witness for plaintiff in error, testified the theatre would constitute more than one-half the ground floor, and up to the sixth story of an eight-story building (Tr. p. 246).

John D. Galloway, structural engineer, testified the threatre would constitute at least seventy-five per cent of the combined office and theatre building (Tr. p. 249).

And yet while the theatre constituted from one-half to seventy-five per cent of the entire combined building, there was absolutely no drawing or architectural design of the theatre ever prepared. Even the general plans for the theatre had not been prepared.

The specifications of building offered in evidence by defendant in error (plaintiff below) contain the following:

> *"The general plans for the Theatre portion of the building being incomplete still, the intention is to erect the Office Building portion first and especially* rush work on the first section columns, *first and second story beams and sidewalk beams.* Open holes in columns, beams and

girders for *connecting Theatre Catilevers, etc., will be drilled in the field, as arrangement of theatre framing cannot be determined accurately at present,* and this method will not delay any portion of the office building construction, due to lack of information regarding connection" (Tr. p. 108).

F. W. Harding, vice president of defendant in error, testified that the drawings *as far as the theatre was concerned* were never prepared (Tr. p. 255; also p. 201).

S. B. Harding, president of the defendant in error, speaking of the drawings for the building, testified they were only completed in part (Tr. p. 131; also p. 165).

(c) The papers or drawings, so called, in evidence, are mere detailed drawings prepared by the defendant in error for a small part of the office part of the building and mostly cover the thirty-nine and one-fourth tons of steel shipped to plaintiff in error (Tr. bottom p. 201, p. 202).

These papers or drawings are not architectural plans but shop details and there is nothing among them from which one could make an estimate of the total steel for the building (Tr. pp. 247-248).

All the drawings and material sheets in evidence taken together, only cover or represent 256 to 262 tons of steel (Tr. p. 236; also p. 241).

(d) There is no paper or drawing or anything else in the record from which any engineer could determine how many tons of steel would be re-

quired to complete the proposed or projected building.

Testimony William Breite, p. 234, p. 235;
Testimony Peter Zucco, p. 241;
Testimony John D. Galloway, pp. 247, 248.

All the above facts are undisputed. Most of them are taken from the testimony of the chief witnesses for the defendant in error, viz.: S. B. Harding, its president, and F. W. Harding, its vice president. It is not a case where experts disagree because there is no disagreement. The witnesses of the plaintiff in error are not only not contradicted by, but supported by, the testimony of the witnesses for defendant in error, except in one particular viz.: *that there is no way from the evidence by which the number of tons of steel required for the projected building may be ascertained.* The witnesses for defendant in error admit there are no drawings from which this tonnage may be ascertained, but they say that if they know the dimensions generally, they can "cube" a building and thereby estimate the tonnage of steel. This method of "guessing" is the only suggestion of the number of tons of steel required.

But three witnesses testified to the number of tons. S. B. Harding, president of the defendant in error, said about fifteen hundred tons would be required because Mr. Vigus

> *"talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it.* The architect's plans were incomplete and

in examining the plans, I found many discrepancies and from such investigation, and discrepancies found, *think* that building would run up to 1500 tons, if not more" (Tr. p. 130, p. 131).

Frederick Hoffman, an employee of defendant in error testified:

"*To a certain extent I am familiar with the plans and* specifications for the Columbia Theatre job at San Francisco, which came into the shop of the plaintiff early in January, 1907. *At that time I knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions. I had nothing to do with the making of the detail drawings.*

Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?

A. In my judgment, it would take in the neighborhood of 1500 tons.

The WITNESS (continuing). That would be a fair estimate; I arrived at approximately 1500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the city ordinances of San Francisco, covering such buildings at that time. I had before me the city ordinances and specifications. I have no interest in this litigation."

On cross-examination he testified:

"*I did not take off the quantities from the plans of the Columbia Theatre building. I said it would take 1500 tons of steel because I just*

estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for. It was only an estimate."

F. W. Harding, vice-president of the defendant in error, testified (direct examination):

"* * * I can state very approximately that at least 1500 tons of steel would have been required to construct that building. * * * *Although it never* became part of my duty to remember quantities, but I was required to place valuations on work. *The estimating of quantities would be done by our clerical force"* (Tr. p. 182).

On cross-examination he testified:

"I estimated that 1500 tons of steel would be required for the building, but I could not take the quantities to determine that. I had to take the cubic foot rule, because the general drawings were not completed for the entire building, but we knew the size of the building."

This is the only testimony offered by defendant in error to prove the quantity of steel it was required to furnish. How can it expect to sustain the verdict? There is no testimony of the tonnage. S. B. Harding bases his opinion of 1500 tons because some one "talked about" that amount.

Frederick Hoffman, on cross-examination, knew nothing. He simply "estimated"—the better word would be "guessed".

F. W. Harding admitted he knew nothing about taking quantities, but stated "very approximately that at least 1500 tons". It was not a part of his

business to remember quantities but he remembers this amount (Tr. p. 182). *The only people who did the estimating of quantities for the defendant in error*—members of its clerical force—(Tr. p. 182) were not called to testify. Why not? The testimony of witnesses Harding, Frederick Hoffman and H. A. Sell was taken at the plant of defendant in error where all its clerks were and while they were present. Why were they not invited to testify? *Because they would have been compelled to answer that there was no means of determining the number of tons.* They would have testified with witness Breite (Tr. 234-235) that before the number of tons of steel for any particular big building may be determined, there must be a complete design showing each steel member that enters into the building. Without that complete design it is not possible to tell the number. Without that complete design it is impossible to tell the number of tons and that in the case at bar there was nothing to show which way the theatre portion was to be constructed, although there was a portion of the plans that showed a portion of the theatre but without any size or figures or dimensions on it from which you could draw any conclusion whatsoever, and that it would not be possible to cube such a building because the engineer or the man that is cubing the building cannot put himself in touch with the architect's idea or his method of construction. The architect may design some very elaborate architectural features

that require a great deal more steel than other features and until the design is completed it would be impossible for a man to cube up a theatre building, or a theatre, or a church or a large auditorium or building of any such character. And with witness Galloway (Tr. p. 248) that the method of obtaining the weight of steel in a building of this character by obtaining its cube is regarded merely as a general method and is in no sense of the term accurate and that on account of the complications entering into a theatre building and design of a theatre building, that it is impossible to tell the total weight of structural steel in such a building without knowing the design and that the only way to determine the weight of steel for such a building would be to have plans prepared and estimates made, piece by piece.

In their testimony the members of this clerical force would absolutely agree with the testimony given by F. W. Harding, the vice-president of the defendant in error, when he was not thinking of the necessity of establishing that 1500 tons of steel would be required to complete the building and he testified as follows:

> "We cannot tell how to fabricate the steel until we have the design from the architect; until we have that design we don't know what the members are going to consist of absolutely. If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect."
>
> (Tr. p. 225.)

If there is no means of knowing the steel members until the plans are received how may their weight be estimated? Who is to say how long or how short, how heavy or how light, how thick or how thin they may be designed?

A.

The above review of the testimony establishes that the drawings referred to in the original contract were never completed and that there were no drawings in existence for the main part of the combined structure, namely theatre, which was to occupy from one-half to three-quarters of the combined office building and theatre. This makes the contract incomplete and inchoate and unenforceable.

B.

Neither the drawings nor specifications were attached to the alleged contract. Without the specifications and drawings attached the original contract was incomplete.

> "Very often many of the important stipulations and conditions of a contract are incorporated into the specifications as general conditions applicable to almost any work and they should be made a part of the contract with certainty. The plans showing the extent and size of the work undertaken, and specifications describing it and the materials to be used, and the direction as to the performance of the contract are a necessary and important part of the contract. They are as binding as are the terms and covenants of the contract."
>
> *Wait, Engineering and Architectural Jurisprudence,* Sec. 214.

"The amount of work to be performed, which may be taken as the basis of such an estimate of the cost are the quantities given in the specifications or shown on the plans and described in the contract, and it is submitted that the advertisement and proposal might be utilized, if the contract, specifications and plans did not furnish an estimate of its magnitude but not it seems estimates by the company's engineers made after the contract was entered into."

Wait Engineering and Architectural Jurisprudence, 634, Sec. 695.

In *Worden v. Hammond*, 37 Cal. 61 at page 64, the court said:

"The specifications are an essential part of the contract, and are as material as the price of the work or the terms of payment; for the contract price was not to be paid until the barn was completed according to the specifications. It is not indispensable that the specifications be signed by the party to be charged, but it will be sufficient if they are referred to with certainty. *But where the reference is false, it cannot be helped out by oral evidence. Here the specifications were referred to as annexed to the contract, and when the plaintiffs were permitted to introduce in evidence, as the specifications referred to, a paper which they admitted was never attached to the contract, if they did not thereby contract, they added to its terms by oral evidence.*"

In *Willamette Etc. Co. v. College Co.*, 94 Cal. 229, at page 233, the court said:

"The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of payment; and until

> they were 'annexed' to the contract so that its entire terms could be ascertained by mere inspection, and without oral testimony, the contract was only inchoate and not complete, and could not form the basis of a recovery."

The two cases from which the foregoing quotations are taken are approved in *Donnelly v. Adams,* 115 Cal. 129:

> "The only distinction between the contract in the case at bar and those considered in the cases cited lies in the fact that in the present instance the reference is to specifications *signed* in the other it was to specifications *attached.* But the one reference is no less significant and essential than the other. If the specifications be not signed, or if they be not attached, in either case there is a false reference in a written contract which cannot be aided by parol evidence. In both cases the contract is left 'inchoate and not complete, and could not form the basis of a recovery'."

To the same effect see

Gilmore v. Lycoming Fire Ins. Co., 55 Cal. 123.

This same principle is applied in cases where an assignment is made for the benefit of creditors and reference is made to schedule attached, etc. Of course, it is held in these cases that in the absence of the schedule, the contract is rendered so indefinite and uncertain as to be unenforceable.

Woir v. Brown, 14 Barb. 39, 50;
Merchers v. Schloss, 49 How. P. R. 286.

The principle underlying all of these cases is that some of the terms and conditions of the contract

for convenience are not stated in the document itself, but in a document or documents attached and it is elementary that where the contract refers to another paper for some of its terms, the effect is the same as if the words of the paper referred to were inserted in the contract.

Adams v. Hill, 16 Maine 215.

The rule laid down by the foregoing authorities is obviously correct. Without the plans, specifications and detail drawings, it would be impossible to determine the sizes and weight (whether light or heavy) or the character of the various members. Observation of different modes of construction makes it plain that some buildings are of very heavy construction, while others are of the most frail construction.

To bring out in strong relief the uncertain and indefinite nature of this alleged contract, it is only necessary to put this inquiry: Suppose the defendant in error in this action had refused to furnish the materials particularly described in its proposal, and the plaintiff in error insisted that it was entitled to performance upon the part of the defendant in error, what structural material with reference to size, dimensions, character, etc., would the defendant be compelled to furnish? In the absence of plans, specifications and detail drawings, it would be impossible to determine just what would be required.

The facts of the case at bar make the above authorities and principles very pertinent. In none

of the cases cited is there such an absence of the elements essential to the original contract as in the case at bar. Even if the specifications were attached to the contract the difficulty would not be obviated because by the very terms of the specifications the drawing and specifications must co-operate. They are intended to co-operate with the drawings for the same, both those furnished by the architect and those furnished by the engineer and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work.

(Tr. pp. 108-109.)

C.

To emphasize this point we might repeat all we have urged under our first question as under that heading we have discussed generally the questions that may be urged especially under subdivisions A, B, and C, but we leave this subdivision with the suggestion that the general references contained under the heading Question One are applicable to this point, and that even the vice-president of the defendant in error has sustained this point by his testimony in the following language:

> "We cannot tell how to fabricate the steel until we have the design from the architect; until we have that design we don't know what the members are going to consist of absolutely. If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect" (Tr. p. 225).

II.

THERE IS NO EVIDENCE OF GREATER DAMAGE, IF ANY, THAN THE VALUE OF THE STEEL DELIVERED, TO WIT: $3021.90.

The authorities applicable to a case like this are numerous to the effect that the plaintiff is entitled to recover as damages the difference between the cost to him of performing the contract and the contract price.

Among the leading ones are:

Hinckley v. Pittsburg Bessmer Steel Co., 121 U. S. 264;

U. S. v. Behan, 110 U. S. 338;

Sullivan v. McMillan, 8 So. 450 (Fla.);

Wells v. Association, 99 Fed. 222, 53 L. R. A. 33 (Extended note);

Goodrich v. Hubbard, 51 Mich. 63, 16 N. W. 232;

Nash v. Hoxie, 59 Wis. 384, 18 N. W. 408;

Singleton v. Wilson, 85 Tenn. 344, 2 S. W. 861;

Joske v. Pleasants, 39 S. W. 586;

Anvil Mining Co. v. Humble, 153 U. S. 540;

Tufts v. Weinfeld, 88 Wis. 653, 60 N. W. 992;

Crescent Mfg. Co. v. Nelson, 100 Mo. 337, 13 S. W. 505;

Black River Lumber Co. v. Warner, 93 Mo. 389, 6 S. W. 210;

Kingman Co. v. Hanna Wagon Co., 176 Ill. 553;

Williams v. Lumber Co., 118 N. C. 937, 24 S. E. 803.

The rule announced is subject to the qualifications that a reasonable deduction is to be made for the less amount of time required by the plaintiff, its employees and factory and for the release from trouble, risk and responsibility attendant upon a full execution of the contract on the part of the plaintiff.

Kimball v. Deere, 108 Iowa 685, 77 N. W. 1041-1044;

U. S. v. Speed, 8 Wall. 77;

McMaster v. State, 108 N. Y. 542, 15 N. E. 417.

In *Insley v. Shepard,* 31 Fed. 869, at page 873, the court said:

> "The plaintiffs' proof as to the amount of profits which they would have made by the performance of the work *is not disputed, or in any way contradicted by the defendants;* but the Court must assume that there should be a reasonable deduction from this theoretical amount of profit for a '*release from care, trouble, risk and responsibility, attending a full execution of the contract*'. The execution of the contract in question involved considerable risk. The piers which were to be erected by the contractors might have been washed out by a freshet in the river; a span, or some portion of their trestle work might have been destroyed by high water; there might have been delays by bad weather, or inability to procure material, to such an extent as to have very materially reduced the theoretical profits upon this contract. The figures of the plaintiffs' witnesses are based on the assumption that there would be no drawbacks nor losses in the execution of the contract, when every

> practical man knows that losses and delays are as a rule encountered in almost every contract like this. Hence I have concluded to take 30 per cent from the theoretical profits which the plaintiffs' proofs show they would have made by executing this contract for the performance of such work."

The evidence with respect to the damages alleged to have been sustained by the plaintiff is necessarily indefinite and uncertain, because of the absence of the plans, specifications and detail drawings and consequently the inability of any one to determine definitely the amount of steel which would be required for the building.

It has been seen that in some of the correspondence the plaintiff estimates that the amount of steel which would be required would be 1200 tons (Tr. p. 224; p. 227). At the time of the trial, in an effort to increase its possible recovery, witnesses of the plaintiff testified that the amount of steel which would be required was 1500 tons. The evidence on the part of the defendant shows that the drawings which had been received in evidence describing the tonnage, amounted to only 256 or 257 tons but that unless detail drawings were furnished, it could not be definitely determined just how much steel would be required and that "cubing" was a unreliable method of determining such quantity.

While there was some testimony offered by the defendant in error having a tendency to show loss of profits, if we assume it were possible to deter-

mine the tonnage of steel required, proof thereof was not *"clear and direct"*, as is required.

In the case of *United States v Behan,* 110 U. S. 338, the facts were as follows: One Roy and the United States entered into a contract to improve the harbor of New Orleans, and later upon the contract with Roy being annulled, the surety on Roy's bond was authorized to fulfill the contract. He went to expense in providing machinery and materials and did a portion of the work when the government finally cancelled the contract. The claimant thereupon sold the materials on hand. The Court of Claims allowed him for his actual expenditures in the prosecution of the work, together with the unavoidable losses on materials. The government appealed on the ground that by making a claim for profits the claimant asserted the existence of the contract and could only recover nominal damages if he was unable to show that profits would have been made. The Supreme Court, however, speaking by Justice Bradley, in affirming the decision of the Court of Claims, said:

> "The prima facie measure of damages for the breach of the contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damages, namely: first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. *The second*

item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the language of Chief Justice Nelson, in the case of Masterton v. Mayor of Brooklyn, they are the 'direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the enjoyment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party who has voluntarily stopped the performance of the contract, can show to the contrary."

In *United States v. Speed,* 8 Wallace (75 U. S.) 77, the plaintiff agreed to pack for the U. S. Government 50,000 hogs, which were to be furnished, together with materials for packing by the government. The government after furnishing some 16,000 hogs refused to furnish the remainder, although the plaintiff was ready to pack the same. Justice Miller, delivering the opinion of the court, said:

"And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work

> and what claimants were to receive for it, making a reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract."

(In passing we may say that the court declined to so charge the jury, although expressly requested to do so by us.)

To entitle the plaintiff to recover damages in any specific amount, it was incumbent upon it in substantiating its claim of loss of profits, to show the cost to it of fabricating and handling the steel, and of course this could not be made in the absence of a showing of the quantity of steel which was required. Plaintiff's evidence of quantity had no real foundation, but was entirely based on estimates; in other words, one of the most essential items necessary to be considered was lacking. In this respect the case at bar is similar to *Sullivan et al., v. McMillan et al.*, 26 Fla. 543; 8 So. 450, which was an action originally brought by McMillan and Wiggins to recover damages for the breach of contract in and by which plaintiffs agreed to cut and deliver logs of specified dimensions. One of the questions involved in the case was the cost of delivering a large number of logs at the rate of 100 logs per day requiring deliveries extending over a period of two years. Referring to this question and speaking of the testimony of one of the plaintiffs as to what it would have cost to deliver the logs in question, the court said (8 So. 463);

"The absence from his statement of the number of teams it would have been necessary to keep on hand and employ to ensure their delivery of so many logs daily during so long a period is to our minds strong evidence in itself that he did not understand that he was speaking of such a proposition; but whether he did or not so understand we do not think his testimony was sufficient to justify a verdict upon the basis of the delivery of 100 or any other number per day; for when he proceeds to itemize the expenses of delivering, *he omits certain elements of expense which, in view of the items he mentions, suggests themselves, and independent of which no verdict approximating justice can be rendered.* Had the contract been performed in full the value of the use of the teams required for performance would have been an element of expense. When he ceased to perform, his expense ceased; his teams then became free to be used in any other venture, and were no longer employed in this; or, if he had been hiring them from other persons, the cost of their use would have ceased. It cannot be that the plaintiffs are to be better off than they would have been if they had performed the contract; yet if the value of the use of, or the cost of hiring, the oxen which would have been employed in the performance of the contract is not included as an expense, it is certain that less expense is estimated, and consequently greater profit allowed, than would have been in case of actual performance. This item of expense, and we do not say there are not others of the same kind, is necessarily shown by the fact that teams are proved to have been used in the performance of the contract. It is of course to be distinguished from any item of expense which those given do not suggest as necessarily attending the performance of the contract. It

> is a patent defect in the testimony of the witness, and destroys it as the basis of a just or legal verdict, whatever the number of logs to be delivered daily was."

It is to be expected in a case of this kind, that the testimony on the part of defendant in error respecting anticipated profits would be quite full.

In this connection, we quote the language of the court in *Masterton v. Mayor,* 7 Hill 61; 42 A. D. 38, at page 45, where it was said:

> "It is a very easy matter to figure out large profits upon paper; but as will be found, these, in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article, that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital."

Where the evidence shows actual damage, but fails to show with reasonable certainty the extent of such damage, plaintiff is entitled to nominal damages only.

> *R. R. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640;
>
> *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

The evidence in this case does not measure up to the standard fixed by the above decisions. There is no evidence to prove that there would have been any profits in the alleged contract. On the contrary, it affirmatively shows that on performance of the contract the plaintiff would have made little or no profit.

In this case every element of certainty is absent and every element of conjecture, speculation and guesswork is present.

(a) The number of tons of steel required must be shown by defendant in error. It failed. There were no drawings by which it could be shown, so the witnesses indulged in guessing. None of them ever attempted to take the quantities. They could not be taken as there were no drawings. The value of S. B. Harding's testimony is destroyed because he bases his estimate "on talk" he heard and previously in two letters he had guessed "about 1200 tons". Frederick W. Hoffman on cross-examination said: "*I said it would take 1500 tons of steel because I just estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for. It was only an estimate*" (Tr. p. 178). With this cross-examination before us, the testimony is valueless. It is hardly to be characterized as more than "mere conjecture". F. W. Harding also guessed, but admitted that he never took quantities, nor was he called to remember them (Tr. p. 182) and

then destroyed the "guess" by testifying that until the architectural design is made you cannot know the character of the members of which the building will consist (Tr. p. 225). Therefore, he agrees with the testimony of the structural engineers to the effect that until the architectural design is prepared the tonnage cannot be determined (Tr. pp. 248, 241, 234, 235).

(b) As the tonnage cannot be ascertained, the contract price cannot be ascertained.

(c) It is plainly evident that the defendant in error "guessed" at its damages and relied upon the inexperience of the plaintiff in error to aid it in securing the enormous amount it demanded. This is demonstrated by the different amounts claimed at the different times as shown above. Every officer of the defendant in error estimated the damages in a different amount. In the first estimate, the sum of $30,230 was claimed and the large amount of $20,-606.47 was itemized as "unused shop space". In the second estimate, this amount was similarly labeled, while in the third estimate it was designated as "loss of profits". In the letter written by the secretary of the defendant in error, the damages were fixed at $30,931.23. In reaching this estimate, not only the cost of the raw material and of fabricating the steel were included, but also certain percentages of the various costs entering into the work were also added. These percentages were classified as "overhead expenses". Overhead expenses are

defined in the testimony of S. B. Harding (Tr. p. 169) as follows:

> "Q. Your overhead expense, as I understand it, is for the general management of the business of the Modern Steel Structural Company, applying to all contracts and all work being done by that company?
> A. Yes, divided proportionally."

By the testimony of Samuel B. Harding, the damages claimed by the defendant in error *without allowing any portion of the overhead expense* as part of its cost were fixed at $34,470 (Tr. p. 156); the damages fixed by Mr. Simpson, the Secretary of the Company, in his letter of October 15th, 1907, and in which he allowed as part of the cost of doing in the work a proportion of the overhead expense, were $30,931.23 (Tr. pp. 211-222).

It is admitted that the overhead expense of the defendant in error during the time the contract in question was being fulfilled by it, amounted to $86,055.76 annually, or $7171.23 per month (Tr. p. 164), and that one-third of the plant of defendant in error for a period of from sixty to ninety days would be used in completing the contract in question (Tr. p. 171). Hence the overhead expense that should be charged against this work would be at least $7171.23, but the lower court, under its rulings prevented the overhead expense being considered as part of the cost of the work notwithstanding that Samuel B. Harding testified that every item of

overhead expense bore on the cost of doing this work (Tr. pp. 163-164).

The extreme difficulty that defendant in error experienced in trying to ascertain the damages it sustained, if any, demonstrated that it was "speculating", "conjecturing" or "guessing" at its damages. At first it demanded $30,230 (Tr. p. 138). Although it had several days to figure that amount it wrote under date of October 15th, 1907 (Tr. p. 211), that the above figures were made up "somewhat hurriedly", and corrected them by fixing its damage at $30,931.23. It changed this amount when it filed its first complaint herein to $30,881.23 (Tr. p. 10) and again it changed it in its final complaint to $35,164.17 (Tr. p. 47). The two witnesses who figured out the damages at the trial—S. B. Harding and F. W. Harding, neither one charging any part of the "overhead expenses" of defendant in error against this contract—differed greatly. S. B. Harding fixed the damages at $34,470 (Tr. p. 156) while F. W. Harding said $29,637 (Tr. p. 186).

This evidence indicates that there were no damages except for the work done and that the telegraphic demand for $30,230 was made on the expectation that the "inexperience" of the plaintiff in error would cause its payment without investigation. When the plaintiff in error asked for details then came the long letter of October 15th, 1907 (Tr. p. 211) in an effort to sustain this outrageous demand. In that letter, in its effort to bolster up

its claim for damages it added the following "overhead charges":

Plus 15% drawing general	$202.50	
Shop labor at .24cts. per 100#	7200.00	
Plus 60% shop general	4320.00	
	$11,722.50	
Plus 15% Office & Sol. Genl.	1960.87	$13683.37
Plus ½% Business General		68.41
		$13751.78

Also an estimated profit of $20,606.47 (Tr. p. 217).

But on the trial it vigorously contended that "overhead expenses" although part of its cost in doing this work should not be added to the cost of this contract in ascertaining its damage. This is a decided change of front. The "overhead expenses" of defendant in error amounted to $7171.23 monthly (Tr. p. 164) and if the court had allowed the jury to consider them, there would have been no profits and the verdict would have been only for the money expended by defendant in error in the performance of its contract, to wit, $3021., the value of the steel delivered. This figure is almost reached by deducting the above sum of $13,751.78, the total overhead expenses from the verdict of the jury:

Verdict	$17,372.00
Overhead expenses	13,751.78
	$3,620.22

THE EVIDENCE SHOWS WITHOUT CONFLICT THAT DEFENDANT IN ERROR WOULD NOT HAVE MADE ANY PROFIT—BUT WOULD HAVE LOST MONEY—IF THE CONTRACT HAD BEEN PERFORMED.

We shall demonstrate by the testimony of the witnesses of defendant in error that it would not have made a profit—but would have lost money if the contract had been performed, and that the attempt to procure profits was an effort to coin the misfortunes of plaintiff in error into false profits for the defendant in error.

In this demonstration we shall use the records and the testimony of the defendant in error.

During the taking of the deposition of S. B. Harding at Waukesha, plaintiff in error obtained a copy of *the cost sheet* of the work covered by the alleged contract in this suit. This deposition was taken more than two years before the trial. The fact that plaintiff in error had a copy of this record was forgotten until it was produced in court during the cross-examination of witness F. W. Harding at the close of the case of defendant in error and its real effect will be more clearly apparent now. This cost sheet in connection with the testimony of witnesses for defendant in error proves to a mathematical certainty that the work under this contract could not have been finished at a profit.

In cases of this kind it is most difficult to meet the claim for damages. The claimant asserts that its cost for doing the work would be a certain figure

which cannot be disputed except by its own books which are so involved as to add to the general confusion. If you prove the cost to another firm for doing the work the claimant usually answers that his methods, or something else, reduces the cost. Here by a chance of kind fortune, we are able to destroy the unwarranted claim by the records and sworn testimony of the claimant.

The cost sheet of the Modern Steel Structural Company (defendant in error) for the contract in question is printed in the record (Tr. p. 205) but through the inadvertence of the printer it is headed *"Ledger Sheet American-Pacific Construction Company"*. This error will be corrected at the oral argument.

In this cost sheet are included all the cost incurred by the Modern Steel Structural Company (defendant in error) in performing the alleged contract.

> "I hand you this (referring to above cost sheet) and ask you if that is not a copy of the detailed cost sheet of your work for the 39¼ tons?
>
> A. No, sir; *I should say not. It includes all the work done on this contract* up to a certain date. It includes some draughting, office labor and shop labor and freight charges not solely relating to the 39¼ tons.
>
> There is nothing that I see that sets out the work but I know by our general methods of cost keeping that the records of all the work of every nature on the contract would go into the office and naturally this would be the record of this contract and all that we did up to that date."

Q. "Is that a copy of your ledger showing the work done, the drawing labor, the fabrication, or rather, the shop cost?

A. It seems to be.

Q. Is there any question about that being a copy of the page from your ledger?

A. No, there is no question.

Q. And the page of the ledger that refers to this contract, the contract with the American-Pacific Construction Company?

A. Yes.

Q. When you receive a contract you give it a number.

A. Yes.

Q. What is the number of the American-Pacific contract?

A. 561.

Q. That is a record of the work done under that contract?

A. Yes."

(Cross-examination F. W. Harding, Tr. p. 203.)

"Q. Do you know whether or not that ledger account was closed and when it was closed?

A. Closed, and possibly shown right here. I should say after that part of the work was performed (referring to entry on exhibit 'B'). We have not entered on that account there what the American-Pacific Construction owes us.

Q. You mean for future profits that you would have earned if that contract was carried out?

A. We are carrying such an account on our books.

Q. Which account includes what you estimate would be your profit? That account was closed when this litigation began by the notation on it 'in litigation'?

A. This account was closed.

Q. In so far as entries being made upon it?
A. Yes.
Q. And entries were made upon that account up to the time this litigation began?
A. Of this nature."

(Recross examination of F. W. Harding, Tr. p. 230.)

"Redirect Examination.

Mr. Taylor. Q. Mr. Harding, the sheet that you have presented here presents the actual items you have paid out as costs. Is that correct?
A. Yes.
Q. And does not embrace the damages by reason of the breach of contract?
A. No, sir.
Q. There is nothing stated in that about a breach of contract?
A. No, sir."

(Redirect examination of F. W. Harding, Tr. p. 231.)

Hence this sheet represents the actual cost to defendant in error of all work done by it under the contract in question.

No steel was fabricated other than the 39¼ tons shipped to the plaintiff in error.

(Cross-examination F. W. Harding, Tr. bottom pages 230-231.)

Consequently we seek to know the cost of the work that did not relate solely to said 39¼ tons. The answer is in the record: "It includes some draughting, office and shop labor and freight charges not solely relating to the 39¼ tons" (Tr. p. 203).

To obtain its cost for the 39¼ tons we must deduct the other items of cost.

The cost sheet shows that the entire freight and cartage included therein is $9.73 (Tr. p. 205) and Mr. S. B. Harding, president of defendant in error, contradicts Mr. F. W. Harding as he testified the charge of $9.73 was for cartage on the 39¼ tons (Tr. p. 160). However we shall accept the version most favorable to defendant in error and omit it from the cost of 39¼ tons. The only other work done under the contract was the preparation of some templates.

> "Q. It is also a fact, is it not, that the only work that you did under this contract was the fabrication of 39¼ tons of steel?
>
> A. Yes; and the preparation of some templates, etc., for the plans.
>
> Q. Then, I understand that the entire work that has been done by the Modern Steel Structural Company under this contract consist of the fabrication of 39¼ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the 39¼ tons of steel which have been delivered and for work that you expected to do and the preparation of templates for the work that was delivered and for future work?
>
> A. Yes, and the ordering of steel.
>
> Q. Now, is there any cost to the ordering of steel?
>
> A. We do that with our office force under the head of 'overhead expenses'" (Tr. p. 162).

The insignificance of the cost of templates is apparent from the testimony of F. W. Harding (Tr. p. 183; p. 185).

Only drawings for 262 tons of steel were prepared and templates could not be made for more tonnage than there were drawings finished (Tr. p. 183) and the templates for the difference in tonnage between 262 tons and 1500 tons or 1238 tons would be only $32 (Tr. p. 185) and the labor would be inconsiderable. Only 161¼ tons of steel were delivered to the works of defendant (Tr. p. 167).

Two facts established beyond all question are:

1st. Thirty-nine and one-quarter tons of steel for office building were fabricated and delivered.

2nd. Drawings were finished for 255 tons and no more.

Testimony of F. W. Harding, Tr. p. 201; p. 183; p. 206.
Testimony of W. M. Breite, Tr. p. 237.
Testimony of P. Zucco, Tr. pp. 256-257.

This is not disputed.

On the basis of 1200 tons, this would be, according to Mr. Breite, one tenth of all the drawings to be done.

Tr. p. 237.

This is likewise not disputed.

By the cost sheet this drawing labor (without overhead) is shown to have cost $669.28 for one tenth of the work, and the whole would have cost on that basis $6,692.80. (For the present we are not taking the theatre at $5.00, the price per ton

all agree that drawing labor for a theatre would cost.)

By the same cost sheet, the shop labor for 39¼ tons is $328.64 (without overhead), or $8.37 per ton, which is about the price all experts agree the shop labor is worth.

But Mr. F. W. Harding says there was other shop labor included in those figures. But what could it have been?

S. B. Harding's testimony is:

"Q. It is also a fact, is it not that the only work that you did under this contract was the fabrication of 39¼ tons of steel?

A. Yes; and the preparation of some templets, etc., for the plans.

Q. Then, I understand that the entire work that has been done by the Modern Steel Structural Company under this contract consists of the fabrication of 39¼ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the 39¼ tons of steel which had been delivered, and for the work that you expected to do, and the preparation of templets for the work that was delivered and for future work?

A. Yes. And the ordering of steel.

Q. Now, is there any cost to the ordering of steel?

A. We do that with our office force under the head of overhead expenses" (Tr. p. 162).

F. W. Harding says:

"Mr. HUMPHREY. Q. Did you fabricate any work other than you shipped to us?

A. On this contract?

Q. Yes.
A. No, sir, I do not believe that we did fabricate any other" (Tr. p. 203).

Now, if they did not fabricate any but 39¼ tons, the other shop labor must be for handling the difference between 161¼ tons and 39¼ tons, or 122 tons (Tr. p. 167).

The cost of handling is 13 cents per ton (Tr. bottom p. 159).

The cost of handling the 122 tons would be $15.86. Deducting this from $328.64, we have $312.78 as the shop cost of the 39¼ tons, save a small deduction for some templates that were made. This item appeared so small that it was not mentioned. It appears that the making of templates is the smallest portion of the shop labor. However, we shall deduct from our above showing of $8.37 per ton for shop labor cost $0.37 as a most liberal allowance per ton for labor in making templates, and we then have the following:

Drawing Costs.

$669.28 (all work) Breite's testimony 256 tons, but 1/10 of drawing work of job.....$6692.80

Shop Labor.

328.64 39¼ tons (all that was fabricated),

or

39¼)328.64=$8.37

but by the allowance of 37 cents as above the shop cost per ton is $8.00.

Assuming office part only 50 per cent of the entire building—and all agree it was at least 50 per cent thereof,—and basing cost on their own letters, dated February 12th, 1907, marked Exhibit "E" and "G" (Tr. pp. 224-227), which estimates job at 1200 tons, we find

$8.00 per ton
600 tons office part

$4800. shop cost office portion

Theatre portion cost 50 per cent more (Snyder, Breite and Zucco). Harding agrees it would be more (Tr. p. 202).

Office	$ 4,800.00	
Theatre	7,200.00	
Total shop cost	12,000.00	
Total drawing cost	6,692.80	
	$18,692.80	
Freight on 1200 tons at $15.00 per ton	18,000.00	
1200 tons steel at $38	45,600.00	
	$82,292.80	
Add $4.10 per ton for drawing labor for theatre portion	2,460.00	
	$84,752.80	
	$84,752.80	Total cost.

1200 tons steel at 77=$92,400.00
Total cost as above..... 84,752.80

$ 7,647.20 apparent profit on Plaintiff's own figures.

Hence on their own figures, without "overheads", wear and tear on machinery, cost of drawing paper, wood, paint, brushes, power, etc., they only show a profit of $7,647.20. Make deductions for depreciation, cost of materials for drawing, for templates, cost of power, allowance for exemption of risk and trouble, time saved and this apparent profit would be swept away. If you deduct $7171.23 (Tr. p. 164) one-third of the overheads for three months as the performance of the contract would require one-third of the plant of defendant in error and its force for three months, the apparent profit becomes a loss of $524.03 and includes payment of the contract price for the steel (39¼ tons) delivered. In these figures we have taken the cost of drawing labor for a theatre at $4.10 per ton; while even W. F. Harding figures it at $5.00 per ton (Tr. p. 254).

Take the figures of the other experts and defendant in error would have lost a great deal more.

Plaintiff's letters written before the breach confirm this:

> "You will remember the night the writer made out the pencil form, he said that the

work was worth $77 and we discussed where you would get the other $2.00 above the $75.00.

"No, if you can buy this job one cent cheaper anywhere *we will be very much pleased to relieve you of the obligation to us*" (Tr. p. 188).

"If you desire to buy the job elsewhere and not give the $77, we would be *very* much *pleased to release you, only asking you to pay for what we have already done*" (Tr. p. 189).

"He admitted that he did, and the writer said to him that we regretted that there was any misunderstanding between yourself and the writer as we felt in the whole transaction *that we were more carrying out the obligation made by G. W. Harding of Los Angeles than anything else as we were so filled up with work, and the writer further said that we would be pleased if we could sublet it to some one and get out even and at the same time serve you,* but if we could not we were going to stick by and fill the order" (Tr. p. 196).

The plaintiff had no certain basis upon which to base its claim. On October 15, 1907, it wrote that it was damaged in the sum of $30,230.00, but the elements of its damage then were quite different than the elements urged in this action.

If the plaintiff itself could not even state the elements of its damages, how could the jury do more than follow plaintiff's example and merely guess? Apparently that was done, and the verdict resulted from guesswork.

The claim for damages varied as the necessities of the case varied. In 1907, when it believed that its damages were to be measured by the value of unused shop space, and also by the amount which

would be required to perform the contract, its figures representing these items and its costs were large. When, however, it was advised that its measure of damages would be the difference between the cost of performing the contract and the amount it was to receive for the performance thereof, it became important for it to show that the cost of performing was much less so as to increase its alleged profits.

III.

VARIANCE.

(a)

The complaint alleged a contract for the fabrication and delivery of an *agreed amount* of steel, to wit: 1500 tons (Tr. p. 44). There was no proof of any contract or agreement. Opinions and "guesses" of the amount of steel that would be required for unfinished and probably unconceived drawings and a writing was received in evidence that absolutely negatived the idea of an agreement on the amount of tonnage.

(b)

The allegations were that the deliveries under the contract were to be made by September 1, 1907 (Tr. pp. 43-44).

There was no evidence offered of such a contract. On the contrary, the only evidence showed that deliveries were to be made:

DELIVERY: As follows: That portion indicated by Mr. Smedberg shown within red lines on blue print, 3-S, 4-S, 7-S, dated by us on the back of print as received Dec. 31, and 8-S, dated by us on the back of print as received January 3, 1907, required to begin the erection of steel work on stores, to be shipped from our shop thirty days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg from date of approval (Tr. pp. 2-3).

This is a complete variance and sufficient to defeat the claim of defendant in error.

IV.

UNDER THE TERMS OF THIS PROPOSAL OR CONTRACT IT WAS NECESSARY FOR THE DEEFNDANT IN ERROR TO SUBMIT TO ARBITRATION ITS CLAIM BEFORE INSTITUTING THIS ACTION.

The provisions of the contract in this action is as follows:

> "In case any difference of opinion shall arise between the parties to this contract, in relation to the contract or work to be done, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two persons shall have the power to name an uninterested umpire, whose decision shall be binding on all the parties to the contract."

In *Holmes v. Richet,* 56 Cal. 312, the Supreme Court of that State said:

> "By the terms of the contract, authority was given the architect to decide any dispute that might arise respecting the true construction and meaning of the drawings or specifications and upon all such questions his decision should be final; but upon the question of extra work, he was not authorized to decide. On the contrary, by the express terms of the contract, such disputes, were to be referred to two competent persons, and if they could not agree, the services of an umpire were to be invoked. Was it competent for the parties to make such a stipulation? It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties notwithstanding such an agreement. But that is not this case. Here the parties simply agreed that the amount or value of certain extra work should be fixed in a certain manner, and was there any right of action in this case for and on account of said extra work until the value thereof was fixed according to the terms and conditions of the contract? In other words, was it not a condition precedent to any right of action, that the value of the extra work should be determined in the mode provided by the contract? This question was very elaborately considered by the Court of Appeals of New York, in the recent case of The President, etc. v. The Pennsylvania Coal Company, 50 N. Y. 250. The Court there says: 'The distinction between the two classes of cases is marked and well defined. In one case, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all

disputes and difference by arbitration, to the exclusion of the Court; and in the other they merely by the same agreement which creates the liability and gives the right, qualified the right by providing that, before any right of action shall accrued, certain facts shall be determined, or amounts and values ascertained and this is made a condition precedent, either in terms or by necessary implication. This condition being lawful, the Courts have never hesitated to give full effect to it. * * *

Conclusion.

Plaintiff in error respectfully submits that the judgment should be reversed for the following reasons:

First. There was no valid contract.

Second. There was no damages proved.

Third. There was a fatal variance between the allegations and the proofs.

Fourth. The action was premature as the alleged contract, if a contract, provided within its own terms a means of settling the very points involved in this action.

Respectfully submitted,

WILLIAM F. HUMPHREY,
Attorney for Plaintiff in Error.

LENT & HUMPHREY,
Of Counsel.